

## **PUBLIC CONTRACTS REVIEW BOARD**

Appeal Reference Number 2187  
Tender Reference Number SPD2/2025/056  
Tender Name **“Framework Contract for the Leasing of Monoblock Portacabins and Portable Toilets for the Fairyland Event including the supply, delivery, installation, cleaning and removal using environmentally friendly materials for the Malta Tourism Authority”**

The Public Contracts Review Board (hereinafter the ‘Board’ or the ‘PCRB’) convened a public hearing on the 28<sup>th</sup> November, 2025 to hear the appeal as filed by the appellant Mr Franco Scicluna (hereinafter the ‘Appellant’) on the 10<sup>th</sup> November, 2025, and after taking cognisance of:

The tender document for the ‘Framework Contract for the Leasing of Monoblock Portacabins and Portable Toilets for the Fairyland Event including the supply, delivery, installation, cleaning and removal using environmentally friendly materials for the Malta Tourism Authority’ (hereinafter referred to as the “Tender Document”);

The minutes of the proceedings dated 28<sup>th</sup> November, 2025 which are being reproduced hereunder:

### ***“PUBLIC CONTRACTS REVIEW BOARD***

*Case 2187 – SPD2/2025/056 – Framework Contract for the leasing of Monoblock Portacabins Toilets for the Fairyland Event Using Environmentally Friendly Materials for the Malta Tourism Authority.*

*The tender was issued on the 8<sup>th</sup> August 2025, and the closing date was the 15<sup>th</sup> September 2025.*

*The estimated value of the tender, excluding VAT, was €90,000.*

*On 10<sup>th</sup> November 2025 Franco Scicluna (MT 1528-5728) lodged an appeal against Malta Tourism Authority – the Contracting Authority, in accordance with Regulation 270 of the Public Procurement Regulations. The tender was technically non-compliant.*

*A deposit of €450.00 was paid.*

*There were two bids.*

*On the 28<sup>th</sup> November 2025, the Public Contracts Review Board (PCRB), composed of Dr Ana Thomas as Chairperson, Ing. Dr Damien Gatt and Mr. Lawrence Ancilleri, as members, convened a public hearing to consider the appeal.*

*The attendance for this public hearing was as follows:*

**Appellant – Franco Scicluna (MT 1528-5728)**

*Dr Carlos Bugeja – Legal Representative.*

*Mr. Franco Scicluna – Company Representative.*

**Contracting Authority – Malta Tourism Authority**

*Dr Maria Lisa Buttigieg – Legal Representative.*

*Mr. Kearon Bruno – Chairperson.*

*Mr. Oliver Farrugia – Secretary.*

*Ms. Kyle Grech – Procurement Official.*

**Recommended Bidder – General Cleaners Co. Limited. (C14053).**

*Mr. Ramon Fenech – Company Representative.*

**Opening Statements**

*Dr Ana Thomas, Chairperson of the Public Contracts Review Board, welcomed the parties present — namely, the Appellant, Franco Scicluna, the Contracting Authority, Malta Tourism Authority and the Recommended Bidder, General Cleaners Co. Limited.*

**Initial Submissions**

*The Chairperson, Dr Ana Thomas, stated that one of the Board members shall be joining online, as he could not be present for the hearing.*

*Dr Carlos Bugeja, for Mr Franco Scicluna, declared that he had no witnesses and offered to deliver the opening and closing submissions at once.*

**Final Submissions by Dr Carlos Bugeja (for the Appellant)**

*Dr Bugeja noted that Franco Scicluna was disqualified because of items 6 and 7 in the technical offer. He observed that these two items were not, in fact, a technical offer, as a technical offer usually sets out the way forward for a recommended bidder. Rather than a confirmation, a technical offer normally contains a detailed declaration by the bidder.*

*For items 6 and 7, the bidder was only required to write “Yes” to confirm declarations already made in the same tender document. Regarding item 6, he quoted:*

*“We confirm the following, opening schedule of the event and provision of service. Fairyland normally starts around 6th December and ends around, and so on”.*

*This merely describes Fairyland. The bidder is being asked to confirm something already declared by others, as stated in clause 4.26 of the Terms of Reference. The Contracting Authority was asking for confirmation about Fairyland. This is Note 3, and the bidder is not providing any new information. The subject is public toilets at Fairyland in Valletta. Franco Scicluna did not tick item 6, as it is solely a confirmation of a declaration on the technical offer form.*

*Item 7 concerns obligations requested by the Contracting Authority from the recommended bidder, to be replicated in the contract. The Malta Tourism Authority stated that Franco Scicluna failed to answer these two items, but there was no information to provide.*

*The Contracting Authority would have been none the wiser had Franco Scicluna ticked both boxes "YES", because no information was missing. Dr Bugeja referenced PCRB Case 1653 CT2263/2019, Evolve Ltd vs University of Malta, in which a bidder forgot to tick a number, although the information appeared in the supporting literature. The PCRB recognised the mistake as genuine, accepted that the information was available, and was not prepared to disqualify the bidder when the Contracting Authority already had the information.*

*In this case, the Contracting Authority would not have gained any additional information if Franco Scicluna had ticked the boxes; it was only a confirmation of a declaration on the technical form.*

*Section 2 of the tender document, Special Conditions 2.5, states that the contract is made up of several documents, in order of precedence: the signed agreement, the special conditions, the general conditions, the Contracting Authority's Terms of Reference and design documentation, and the contractor's technical offer.*

*This shows that the Special Conditions and the Terms of Reference take precedence over the technical offer. Dr Bugeja referred to Section 3, Terms of Reference, and noted that the requests in the technical form were repeated in Section 3 of the Special Conditions. The reference to 6 December appears in Terms of Reference clause 4.2.6. Even though Franco Scicluna did not tick the boxes in the technical offer form, he had already accepted the obligations in Terms of Reference 4.2.6, which, under clause 2.5 of the Special Conditions, take precedence over the technical form.*

*Franco Scicluna accepted the special conditions previously. This was a declaration of principle. Dr Bugeja emphasised that he was not asking for a rectification; a simple clarification could have been requested. The Board had stated that an offer should not be disqualified when a clarification could resolve the issue. He noted that their offer was the lowest bid. The estimated value was €90,000, while the awarded tender amounted to €112,760.*

*The Contracting Authority has the discretion to choose a bid above the estimated value, but it also has the discretion to request clarification under Note 3. Dr Bugeja acknowledged he had no right to object to the award being 25% higher but argued that the Contracting Authority had the discretion to request clarification and failed to do so. The two discretions were applied with different standards—none in one instance, and heavily in the other. No information was missing; the Contracting Authority would not have been better informed had Franco Scicluna written “YES” in the boxes, and with a clarification they could now be fulfilling the requirements.*

*In the questionnaire forming part of the technical offer:*

*Number 1 refers to the type of mono-cabins to be used*

*Number 2 refers to the portable toilets*

*Number 5 refers to the pick-up date and related dates*

*Numbers 6 and 7 are subsidiary items—re-confirmations of matters already confirmed elsewhere.*

#### ***Final Submissions by Dr Maria Lisa Buttigieg***

*Dr Buttigieg disagreed with the appellant. The bidder was required to fill in the form in toto. She invited the Board to read items 6 and 7 and to see that they are not mere declarations. They contain conditions for those wishing to participate in the tender.*

*Item 6 includes the condition that the bidder must be flexible with the schedule, as the indicated dates may change.*

*Item 7 contains several conditions, including health and safety and standards, which are all important elements. She reminded the Board of the principle of self-limitation, requiring full compliance with all tender regulations.*

*It would not be fair to the public if tender regulations were not respected. In the Instructions to Tenderers and the General Rules Governing Tenders, it is clear that a clarification could not be requested, as any such clarification would amount to rectification. Through a clarification, Franco Scicluna would have adjusted the tick boxes; however, Regulation 3 clearly states that rectification is not permitted.*

*Dr Buttigieg referred to Board Case 1780 CT2391/2021, PTL vs Water Services Corporation, which distinguished between clarification and rectification and held that a bidder who fails to submit all required documentation cannot claim to be compliant. The bid was disqualified because of this nuance, and the Contracting Authority could not proceed in the manner requested by the appellant. Concerning the value, the*

*Contracting Authority exercised its discretion correctly and followed all applicable regulations.*

### **Replica by Dr Carlos Bugeja**

*Dr Bugeja noted Dr Buttigieg's argument that clarification would amount to rectification. However, he argued that the obligations listed in the technical offer also appear in the Terms of Reference, which were accepted in the offer and form part of the contract. Therefore, the same request appeared twice, and Franco Scicluna merely failed to complete one of them.*

*He disagreed with the concept of self-limitation, as the bidder had already committed himself elsewhere in the tender documents.*

### **Conclusion of the Hearing**

*With no further arguments presented, Chairperson Dr Ana Thomas thanked the parties and formally concluded the session."*

The written pleadings as filed by Mr Franco Scicluna on the 10<sup>th</sup> November, 2025, together with proof of payment of a deposit in the amount of €450, wherein it held as follows:

*"Submits respectfully THAT:*

#### *Introduction*

*This Objection refers to SPD2/2025/056 Framework Contract for the Leasing of Monoblock Portacabins and Portable Toilets for the Fairyland Event Using Environmentally Friendly Materials for the Malta Tourism Authority.*

*By means of a letter dated 31 October 2024, bidder Franco Scicluna was informed that his submitted offer was not technically compliant, reason being that: The bidder did not fill all of the Tenderer's Technical offer form leaving out the following: Point number 6- Opening schedule of the event and provision of service And Point number 7 "The technical offer form is thus incomplete. "The bid was thus considered to be technically not compliant.*

*The procurement was recommended for award to TID No 232713 General Cleaners Co. Limited for the amount of €112,760 excluding VAT, this being declared to be the cheapest priced offer satisfying the administrative and technical criteria.*

*Franco Sciculna (hereinafter "Appellant") felt aggrieved from this decision and thus by this present, is objecting to this decision, and is thus filing this appeal, and attaching herewith proof of payment of the required deposit.*

### **Grievance**

*The Appellant submitted its tender on [date] in accordance with the timeframe and the Tender Dossier. In its submission the Appellant completed almost all required items in the Technical Offer*

*Form except Items 6 and 7, which were left unticked, due to an obvious clerical error. Neither the Contracting Authority nor the Evaluation Committee sought a clarification or further information from the Appellant in respect of the omitted Items 6 and 7 prior to disqualifying the tender. This is not a case of the tenderer having affirmatively indicated "No" where "Yes" was required, but rather a purely clerical omission consisting of an unmarked tick line.*

*The Appellant contends that the omission was purely clerical in nature, did not affect the merit of the offer, did not afford any advantage, and that the evaluation committee had sufficient information from the remainder of the submission to assess the tender fairly.*

### **Breach of the Principle of Proportionality**

*Under the Procurement Regulations (S.L. 601.03) the contracting authority must act proportionately: any exclusion must go no further than necessary to protect the integrity of the procedure. The omission of Items 6 and 7 was clerical, did not affect the substance of the offer, and did not confer any competitive edge. Although this item was formally and legally non-rectifiable, its purely declaratory and symbolic nature warranted treatment by way of a simple clarification rather than disqualification. The omission did not alter the substance of the offer or confer any competitive advantage, and could have been regularised through a brief confirmation request.*

*Exclusion in these circumstances was a complete disproportionate penalty. In PCRB Case 1653 (CT 2263/2019) the Board held that the contracting authority had a duty to invite clarification for a non-material oversight and ordered reintegration of the bid - indeed, the approach in this decision should have guided the Contracting Authority on how to deal with this situation. Failing that, the exclusion of the Appellant's tender fails the proportionality test.*

*The principle of equal treatment and transparency implies a contracting authority must use its discretion to invite clarifications where the defect is formal or non-material (as opposed to fundamental). The idea advanced by the PCRB in the abovementioned case and in others is that a contracting authority has an obligation to seek clarification where there could be a simple explanation for the ambiguity and it is capable of being easily resolved.*

*In this case, the blank fields in Items 6 and 7 did not prevent the Evaluation Committee from establishing the bidder's compliance; given this, the contracting authority should have issued a clarification request rather than outright elimination.*

*The authority's failure to request such clarification in such a situation constitutes unfair treatment of the Appellant and undermines the fairness of the procurement process.*

*Furthermore, it must be stressed that Items 6 and 7 on the Technical Offer form are declaratory in character: they require the tenderer to confirm obligations that are already imposed verbatim by Section 3 (Terms of Reference/Technical Specifications) and which, by virtue of clause 2.5 of the Special Conditions, would in any event form part of the contract documents and bind the contractor formally after adjudication. By their order of precedence listed in clause 2.5 (Section 2, Special Conditions), the signed agreement and the terms of reference will still be part of the obligation undertaken. Indeed points 6 and 7 do not create a new obligation; in a way, they just say "yes, I agree to the obligation that is already in Section 3." Since Section 3 is, by the order of precedence, part of the contract anyway, the Contracting Authority would have had that obligation to enforce even if the bidder forgot to tick the box.*

*The omission to tick/declare these items therefore did not in any manner diminish the Contracting Authority's rights at contract execution stage and did not alter the substance or comparability of the offer. That is why a short clarification request would have regularised the position in line with Note 3 of the Instructions to Tenderers. Exclusion in these circumstances was thus manifestly disproportionate. The omission of Items 6 and 7 was purely clerical and did not affect the substance of the Appellant's offer. The contracting authority had the option and the obligation, under the principle of proportionality and duty of clarification, to invite the Appellant to supply the missing information instead of disqualifying the tenderer.*

### ***Estimated Contract Value***

*The Estimated Contract Value was of €90,000. The recommended bidder offered services for 112,760- roughly 25% higher than the estimate. This is not an insignificant number. While it is true that the tender document (Section 1, clause 1.3) clearly states that the EPV of €90,000 is indicative and that the Contracting Authority "reserves the right to accept or reject" offers exceeding it, it must be concerning that the Authority proceeded to accept/recommend an offer of €112,760, i.e. around 25% above its own estimate, there exercising discretion to depart from its financial benchmark, while at the same time, chose not to commit to the simple act of seeking clarification to what was evidently and obviously a clerical error. In other words, the Contracting Authority was very much inconsistent with its approach, being flexible with itself (on the important matter of money), but rigid with the bidder (on a mere and obvious clerical omission). That is the very pattern this Board tends to correct, because procurement principles require coherent, even-handed application of the tender rules, all of this without an objective justification.*

*Therefore in Appellant's humble opinion, even this justifies the argument that the decision hereby appealed is objectionable and merits changing.*

### ***Conclusion***

*On the basis of the above, the Appellant humbly requests the Board to:*

- A. annul that award decision where it deemed Appellant's offer to be technically non-compliant;*
- B. annul the recommendation for award to No 232713 General Cleaners Co. Limited for the amount of €112,760 excluding VAT;*
- C. provide any other remedies deemed fit.*

*The Appellant reserves the right to submit further arguments in support of its objection during the hearing."*

The written reply as filed by the Malta Tourism Authority on the 18<sup>th</sup> November, 2025 (hereinafter the 'Contracting Authority') wherein it held as follows:

*"We write to you for an on behalf of the Malta Tourism Authority (hereinafter referred to as "the Contracting Authority") in connection with the above-captioned Tender, particularly with reference to the appeal filed by Franco Scicluna (hereinafter referred to as "the appellant") on the 10th November, 2025, in order to submit a Reasoned Reply thereto.*

*The Appellant objects to the award of the Tender in favour of the Recommended Bidder, General Cleaners Co Limited, on several grounds which substantially reiterate the same argument: namely, that the Contracting Authority and/or the Evaluation Committee ought to have applied the*

*principle of proportionality and afforded the Appellant an opportunity to clarify or rectify an alleged clerical error on his part. This is notwithstanding the Appellant's own admission that he failed to complete Items 6 and 7 of the Technical Offer Questionnaire ("the Questionnaire").*

*The Contracting Authority respectfully submits that the grievances and arguments advanced by the Appellant are wholly unfounded, both in fact and in law. As the grievances raised essentially reiterate the same point, the Contracting Authority will address all the Appellant's grievances collectively.*

### ***Legal Analysis of the Grievances raised by the Appellant***

*The Appellant contends that the Contracting Authority is obliged to act in accordance with the principle of proportionality and that any exclusion should extend no further than is necessary to safeguard the integrity of the procurement procedure. The Appellant maintains that the omission on his part was purely clerical, did not affect the substance of the offer, and conferred no competitive advantage, being that according to the Appellant the omission was merely declaratory and symbolic in nature. In the Appellant's view, a simple clarification would have sufficed and should have been permitted to regularise his position, notwithstanding his acknowledgment that the items in question were "formally and legally non-rectifiable." To support this position, the Appellant relies on Case 1653 (CT 2263/2019) and argues that, based on established jurisprudence, the Contracting Authority is under an obligation to seek clarification where any ambiguity can be readily explained and resolved.*

*The Contracting Authority respectfully disagrees. It humbly observes that invoking the principle of proportionality has increasingly become a recurring argument to justify negligent bid submissions. However, this principle is not absolute and does not and should not apply in every circumstance, particularly in situations such as the present case.*

*The Technical Offer Questionnaire is a fundamental document, contrary to the Appellant's attempt to minimise its significance. The Questionnaire contains critical declarations that determine whether an offer qualifies for further consideration and potential award. The declarations set out minimum standards and expectations required under the Tender, and Items 6 and 7 comprise some of the most essential undertakings.*

*Item 6 concerns acceptance of any changes to the schedule or location of the Fairyland Event without additional cost or payment. Item 7 requires the Contractor to permit inspection of the portacabins by the Contracting Authority, and also for the Contractor to comply with all health and safety regulations, and assume responsibility for portacabins placed on site, among other conditions.*

*It should be emphasised that the Fairyland Event has become an integral and significant event in Malta, not only as a tourist attraction but also as an experience for families and children during the Christmas period. Where children and the general public are involved, it is imperative that any selected contractor unequivocally accepts these terms.*

*Accordingly, contrary to the Appellant's assertions, the omitted items were far from immaterial. Without express acceptance of these conditions, the Contracting Authority could not have had clear confirmation of compliance on the Appellant's part. Among other mandatory criteria set out in the Tender, this omission rendered the Appellant ineligible for award of the Contract.*

The Contracting Authority was precluded from requesting any clarification. In this regard, reference must be made to the General Rules Governing Tenders (Version 4.10) (hereinafter referred to as the "General Rules"), wherein the following provisions are of particular relevance:

"5.3 The Economic Operator must provide all information and documents required by the provisions of the procurement document. All such documents, without exception, must comply strictly with these conditions and provisions and contain no alterations made by the tenderer."

"16.3 Part 3: Technical Compliance Submissions which have qualified under Part 2 shall have their technical offer evaluated to ensure compliance with Clause 5(C) of the Instructions to Tenderers. In order to be considered for this Evaluation, tenderers must submit a completed Technical Offer. Literature may also be requested with the technical offer so that the Evaluation Committee will corroborate the technical compliance of the offers.

No rectification shall be allowed in respect of the documentation as accompanied by Note 3 in Clause 5 of the Instructions to Tenderers. Only clarifications on the submitted information in respect of the latter may be requested. **No clarifications shall be allowed where there is no doubt that the submitted technical offer does not comply to the requested specifications.** (added emphasis)

In addition to the General Rules, Clause 5 of Section 1 - Instructions to Tenderers within the Tender Document provides the following provisions in relation to the Technical Offer:

"5. Selection and Award Requirements In order to be considered eligible for the award of the contract, economic operators must provide evidence that they meet or exceed certain minimum criteria described hereunder. ...

(C) Specifications (i) Tenderer's Technical Offer in response to specifications to be submitted online through the prescribed Tender Response Format and by using the Tender Preparation Tool provided. (Note 3)

(a) Tenderer's Technical Questionnaire (Note 3)

(b) Literature as per Form marked 'Literature List' to be submitted with the Technical offer at tendering stage. The scope of the literature is to corroborate a fully compliant technical offer. (Note 2)" (added emphasis)

In the present case, it is evident from the foregoing provisions and the surrounding circumstances that the Contracting Authority was under no obligation to request clarification. Accordingly, no such request was made, as there was no ambiguity: Items 6 and 7 of the Technical Offer were unequivocally left blank. There is nothing to indicate that the omission of these items, arguably among the most onerous and material declarations in the Questionnaire, was the result of a legitimate error. Consequently, the Technical Offer was non-compliant.

It is pertinent to refer to Case 1780 - CT2391/2021 - Supplies - Supply, Installation, Commissioning and Testing of a Virtual Environment and SAN Solution to the Water Services Corporation, decided on 29th August 2022. In this case, which is closely similar to the present circumstances, the Public Contracts Review Board observed the following:

**"Any change that would have resulted in making the bid / offer technically compliant would have been a rectification, something which was not possible.** Hence, in the opinion of this Board, the Evaluation Committee correctly discarded the Appellant's offer as technically non-compliant. **A clarification would not have 'solved' the issue at hand and any further action by the Evaluation Committee would have been going against a fundamental principle of public procurement, i.e. Self-Limitation. Also a level playing field between all economic operators participating in the tender procedure would have been shattered.** This also as confirmed in *Rockcut Limited vs Malta Industrial Parks Ltd et* (Court of Appeal decided on 31st May 2019) whereby: "jekk ir-regoli tas-sejba jimponu l-preżenza ta' tali tagħrif, hu mistenni li offerenti li jiebdu sehem f'dik is-sejba joqogħdu għal dawn ir-regoli. Wara kollox ir-regoli tas-sejba qegħdin hemm biex jigu mbarsa u mhux biex jigu mvarra. Biex jigi zgurati il-barsien ta' dawn il-principji, l-awtorita' kontraenti hija obbligata li tosserva strettament il-kriterji li hija stess tkun stabiliet (ara fdan is-sens is-sentenza tad-29 ta' April 2004, il-Kummissjoni v. CAS Succhi Di Frutta S.p.A, C-496/99, punt15)". " (added emphasis)

In the present case, any request for clarification would have resulted in an amendment to the Technical Offer Questionnaire, which had not been fully completed by the Appellant. Such an amendment was impermissible, as it would have placed the other bidder, who submitted a fully completed Technical Offer Questionnaire, at an unfair disadvantage.

Moreover, the Appellant submitted his tender bid on 3 September 2025, while the tender closed on 15 September 2025, following its publication on 8 August 2025. This timeline afforded the Appellant ample opportunity to review his submission prior to filing and, thereafter, to amend or resubmit a compliant bid before the deadline expired.

Furthermore, proceeding with the award of the contract in favour of the Recommended Bidder cannot, in any way, be construed as inconsistent. This is particularly so given that no additional bids were submitted and the Estimated Procurement Value (EPV) of €90,000 was expressly indicated as being indicative. Accordingly, the Contracting Authority acted entirely consistently and lawfully in accepting the offer submitted by the Recommended Bidder, which was compliant in all material respects and was the cheapest compliant bid.

### **Conclusion**

Therefore, in view of the above and for any other reasons that may be adduced at law at any hearing set by this Board, the Respondent Contracting Authority respectfully requests that this Board, save for any other declaration, order or decree it may deem fit:

- a. Declare the Appellant's objection as unfounded both at law and in fact and consequently rejects the objection and dismiss the same;
- b. Confirms the decision recommending the award of the Tender to General Cleaners Co Limited and lift any measures suspending the tender process; and
- c. Order that Appellant's deposit paid upon filing is not refunded."

The submissions of the Appellant and the Contracting Authority as delivered by their legal representatives;

**Considers;**

This Board notes that the Appellant has brought forward one main grievance relating to the alleged failure by the Tender Evaluation Committee to ask for a clarification on Items numbered six (6) and seven (7) in the Appellant's Technical Offer Questionnaire which consisted of five (5) pages (hereinafter the 'Offer').

**A. Alleged Failure of the TEC to ask for a clarification – breach of proportionality**

The Appellant in this case immediately concedes that owing to a lapsus, he failed to write yes and/or tick the relevant columns in Items numbered 6 and 7 in the Offer as submitted by the Appellant in this tendering process. That is, the Appellant failed to confirm conformity with the said Items numbered 6 and 7. The Appellant argues that the Tender Evaluation Committee could have simply asked for a clarification and all would have been resolved swiftly, and this owing to the fact that in the Appellant's opinion no new information would have been produced by means of the clarification, but rather a confirmation of information given by the Contracting Authority itself.

The Contracting Authority on the other hand contends that given that the Technical Offer Questionnaire was a Note 3, therefore no rectifications could be made and this was not an issue of a simple clarification. The Contracting Authority further argues that had the Tender Evaluation Committee done what the Appellant expected, there could be a breach of the principle of self-limitation.

The Board must necessarily highlight the introductory *nota bene* in bold and in italic on Page 1 of the Technical Offer Questionnaire:

***“N.B. Literature is subject to Note 2. Any other components of the technical offer are under Note 3.”***

This status as Note 3 is also confirmed in Section 1 Clause 5(C)(i)(a) at Page 6 of the Tender Document and defined within the 'Notes to Clause 5' as meaning:

*“No rectification shall be allowed. Only clarifications on the submitted information may be requested. Tenderers will be requested to clarify the submitted information within five (5) working days from notification”.*

This Board must necessarily delve into the difference between a clarification and a rectification, and hereby refers to the recent judgment in the names 'Krypton Chemists Limited (C-8933) v. Central Procurement and Supplies Unit et' dated 13<sup>th</sup> November, 2025 delivered by the Court of Appeal (in its Superior Jurisdiction) which dealt with this distinction precisely:

*“27. Ma hemmx għalfejn ngħidu, il-prinċipju tal-proporzjonalità għandu jiġi applikat b'mod li jhars l-għanijiet tal-proċess tal-akkwist pubbliku, jiġifieri, li l-kuntratt jingħata lil min jagħmel l-orhos u l-abjar offerta, mingħajr ma jinkisru l-prinċipji ta' trattament ugwali u trasparenza. Tali prinċipju però m'għandux jintuża bhala pretest biex offerta irregolari tiġi salvata, jekk dan invassal għal vantaġġ kompetittiv li mhux xieraq.*

*28. Hija rilevanti hafna wkoll f'dan il-qasam tal-liġi d-distinzjoni li teżisti bejn kjarifika u rettifika.*

**29. Kjarifika hija l-azzjoni li permezz tagħha l-awtorità kontraenti tista' titlob spjegazzjoni jew interpretazzjoni fuq informazzjoni li tkun diġà giet sottomessa mal-offerta.** Naturalment il-proċedura tal-kjarifika ma tistax tintuża biex dak li jkun idabbal informazzjoni ġdida jew biex ibiddel issustanza tal-offerta. Il-Qorti tal-Appell fis-sentenza *Rockcut Limited v. Direttur Ġenerali tad-Dipartiment tal-Kuntratti* deċiża fil-25 ta' Ġunju, 2018 stabbiliet li ma tistax tingħata kjarifika ta' tagħrif li ma jkunx ingħata għaliex il-kjarifika sservi biss biex tagħmel aktar ċar tagħrif li jkun diġà mogħti iżda li ma huwiex ċar biżżejjed. Kif ingħad fis-sentenza *Steelshape Ltd v. Direttur tal-Kuntratti* deċiża fis-7 ta' Awwissu, 2013, dak li offerent għandu jgħid, għandu jgħidu mal-offerta u mhux jippretendi li jkun mistoqsi d-dettalji tal-modus operandi tiegħu. **Kjarifika, għalhekk hija limitata għal spjegazzjoni ta' elementi diġà preżenti fl-offerta,** mingħajr ma tinbidel il-kompożizzjoni tagħha.

**30. Rettifika, min-naħa l-oħra, hija l-azzjoni li tippermetti lill-awtorità kontraenti titlob korrezzjoni ta' żbalji jew ommissjonijiet. Tali rettifika hija permessa li ssir sakemm din ma tkunx giet esplicitament eskluża fiddokument tas-sejha. Ifisser dan, li jekk skont id-dokument tas-sejha ma tistax issir rettifika mela allura l-awtorità kontraenti tkun miżmuma milli titlob rettifika għaliex l-awtorità kontraenti hija marbuta mal-kundizzjonijiet tas-sejha, b'dana li jekk hija ma tharishomx hija tkun qiegħda tivvantaġġa offerent fuq iehor** (ara *Projekte Global Ltd v. Kunsill Lokali Marsaskala* deċiża mill-Qorti tal-Appell fis-7 ta' Ottubru, 2014 fejn offerta li ma kinitx akkumpanjata minn garanzja xierqa ma setgħetx tiġi rettifikata għaliex tali rettifika kienet projbita mill-kundizzjonijiet tas-sejha). Minbarra dan, irrettifika tista' ssir biss jekk l-ommissjoni jew żball ikunu manifesti, klerikali jew formali, u dawn la jaffettwaw il-kompetizzjoni u lanqas ma jbiddu ssustanza tal-offerta bhal bdil fil-preżż, fl-ispeċifikazzjonijiet tekniċi, jew fl-elementi essenzjali, Hekk pereżempju fis-sentenza *AIB Insurance Brokers Ltd v. Awtorità dwar it-Transport ta' Malta* deċiża fis-27 ta' Ottubru, 2021, il-Qorti tal-Appell aċċettat rettifika ta' dokument niegħes li ma kienx essenzjali u ma biddilx l-offerta.

31. Imbaddem dan kollu għall-każ tal-lum, din il-Qorti tqis li n-nuqqas fl-istampa tat-tikketta provdut minn Krypton ma taħa l-ebda vantaġġ u ma holoq ebda preġudizzju għall-oblaturi l-oħra. Il-problema fl-istampa kienet biss li din ma kinitx ċara biżżejjed u għalhekk ma setgħetx tingħata faċilment. Nuqqas bhal dan seta' faċilment jiġi msewwi permezz ta' kjarifika għaliex kif rajna aktar kmieni, il-proċedura tal-kjarifika hija aċċettabbli li tintuża meta t-tagħrif mogħti mill-offerent ma jkunx ċar biżżejjed.” (Added emphasis of the PCRB).

Therefore, it follows, that the Appellant's argument would only succeed if this Board determines that the confirmation required in Items 6 and 7 in the Technical Offer Questionnaire constituted already 'submitted information'.

This Board, having reviewed the Technical Offer Questionnaire in detail, as well as the procurement file as a whole, cannot agree with the Appellant in that Items 6 and 7 required a confirmation of information already submitted or information provided purely by the Contracting Authority. What was required in certain parts of Items 6 and 7 was confirmation by the economic operator that he/she/it shall adhere to for example “GPP Criteria – Adherence to Green Public Procurement outlined in Section 3 of the Tender Document”, that the winning bidder shall “bind themselves to accept any changes in the dates / locations that may be requested”. Here, we are not dealing with information which is not clear enough and could have been clarified, but rather a clerical oversight, an omission which required correction. Given the fact that as already considered above the Technical Offer Questionnaire was Note 3, rectifications were disallowed and the Contracting Authority could not have asked for the rectification needed to correct the omissions of the Appellant.

This Board acknowledges that Clause 2.5 of the Special Conditions establishes document precedence whereby the Terms of Reference rank above the technical offer at contract execution. However, this hierarchical ordering does not exempt bidders from completing all mandatory Technical Offer Questionnaire questions. Items 6 and 7 required the bidder's express confirmation of acceptance of specific conditions, and not merely an acknowledgment that such conditions exist elsewhere in the tender documents. The Technical Offer Questionnaire serves as a distinct evaluation function separate from contract execution, and its completion is mandatory under Note 3. The order of precedence ensures contractual enforceability but does not authorise or absolve omissions of required confirmations during the tendering process.

This Board, with respect to the alleged disproportionality, holds that it would have been unfair to have allowed the Appellant to rectify his omissions and given the fact that the Tender Evaluation Committee's hands were tied with the rules established in the Tender Document, there exist no elements of disproportionality.

This Board deems that it is unnecessary to delve into the financial aspect of the present tendering process, given that both the Appellant and the Contracting Authority agree in principle that the Tender Document gave the Contracting Authority discretion to accept financial bids exceeding the estimated procurement value as defined within the Tender Document.<sup>1</sup>

Therefore, the Appellant's grievance is being rejected.

## **DECIDE**

The Board, in view of the foregoing and on the basis of the considerations as outlined above, declares and decides to reject the appeal filed by Mr Franco Scicluna in its entirety.

The Board further decides not to re-imburse the deposit paid by Mr Franco Scicluna.

**Dr Ana Thomas**  
**Chairperson**

**Ing. Dr Damien Gatt**  
**Member**

**Mr Lawrence Ancilleri**  
**Member**

Monday 1<sup>st</sup> December, 2025

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<sup>1</sup> Section 1.3. of the Tender Document:

“The purpose of this value shall be the guidance of prospective bidders when submitting their offer and is not to be considered as a binding capping price.

Therefore, the published Estimated Procurement Value is not restrictive and final on the Contracting Authority. Economic Operators are free to submit financial offers above or below the Estimated Procurement Value. However, the Contracting Authority reserves the right to accept or reject Financial Offers exceeding the Estimated Procurement Value.”